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The evolution of codification: a principal-agent theory of the International Law Commission's influence

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Introduction

The International Law Commission (ILC or the Commission) has a mandate from the U.N. General Assembly (the UNGA or the General Assembly) to codify and progressively develop international law. During most of the ILC's history, the lion's share of its work product took the form of draft articles adopted by the UNGA as the basis for multilateral conventions. The ILC's activities received their principal legal effect during this period through the United Nations treaty-making process, rather than directly on the basis of the ILC's analysis of what customary international law (CIL or custom) does or should require.

In recent decades, however, the ILC has self-consciously limited its efforts to codify or progressively develop international law in the form of multilateral conventions. Instead, it has turned to other outputs—such as principles, conclusions, and draft articles that it does not recommend be turned into treaties. Significantly, the Commission often claims that these outputs reflect CIL. For example, despite recommending that the General Assembly not base a treaty on the Draft Articles on State Responsibility, the ILC as well as many states and commentators assert that the draft articles largely reflect CIL.

This change in behavior presents a puzzle. If the ILC is still engaged in codification and progressive development, why has it changed the form of the work it produces? In this chapter, we argue that increasing political gridlock in the General Assembly—by which we mean a division of views over the substance of international norms and lack of enthusiasm for convening multilateral diplomatic conferences—has led the Commission to modify the form of its work to preserve its influence in shaping the evolution of international law. More specifically, we argue that the reduced likelihood of the General Assembly adopting draft articles as treaties closes off the primary mechanism of ILC influence. In addition, if the UNGA or member states reject an ILC recommendation that its draft articles become treaties, that rejection may suggest that the work product does not reflect existing custom—an alternative mechanism of ILC

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influence. To avoid these negative outcomes, we expect the ILC to turn to other outputs that allow it to continue to influence CIL without the General Assembly's approval.

This chapter makes three contributions to the study of the ILC and custom.¹ First, we use principal-agent theory to model the relationship between the General Assembly and the Commission and how that relationship has evolved over time. Second, drawing upon a new data set that codes all ILC outputs since 1947, we show that the Commission began to favor non-treaty outputs beginning in the early 1990s. This followed a decade when ILC treaty recommendations were not adopted by the UNGA or, if adopted, did not garner sufficient ratifications for the treaties to enter into force. Third, we argue that the shift away from draft treaties increases the salience of the methodology that the ILC uses to enhance its influence when the traditional constraint of UNGA review is unavailable due to gridlock.

The remainder of this chapter proceeds as follows. We begin by briefly reviewing the ILC's mandate to codify and progressively develop international law. We then use principal-agent theory to analyze the relationship between the General Assembly and the Commission. We argue that the ILC chooses the work product that maximizes its influence among states and other actors, subject to its expectations of how the UNGA will respond to its work. Our core claim is that, as gridlock in the General Assembly has limited its ability either to adopt treaties or decisively reject non-treaty outputs, the Commission has had both the incentive and the discretion to choose other outputs that do not require General Assembly approval. We proceed to provide empirical support for this claim, documenting the ILC's shift away from recommending to the UNGA that draft articles be adopted as treaties.

After establishing this empirical claim, we explain why methodology acts as a constraint on the ILC even if it does not similarly limit other actors' claims about the content of custom. More specifically, we argue that the methodology that the ILC uses to prepare non-treaty outputs functions as a de facto substitute for the political blessing associated with the UNGA's adoption of draft treaty articles. Adherence to methodology increases the likelihood that a wider audience—government officials, international judges, national courts and non-state actors—will accept the ILC's non-treaty work products as valid statements of CIL. We thus expect the Commission to select a methodological approach that it expects will be supported by the audience(s) it hopes to persuade. We find suggestive evidence of this behavior in the ILC's recent project on foreign official immunity. We conclude by identifying what we should expect to observe in future ILC work if our claims are correct.

¹ We are not the first to examine changes in the ILC's work product over time. Previous studies that offer a range of normative approaches and illustrations include: Frank Berman, *The ILC within the UN's Legal Framework: Its Relationship with the Sixth Committee*, 49 GERMAN Y.B. INT'L L. 107 (2006); David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority*, 96 AM. J. INT'L L. 857 (2002); Jacob Katz Cogan, *The Changing Form of the International Law Commission's Work* 275, 278-79, in *EVOLUTIONS IN THE LAW OF INTERNATIONAL ORGANIZATIONS* (Robert Virzo & Ivan Ingravallo, eds., 2015); Sean D. Murphy, *Codification, Progressive Development, or Scholarly Analysis? The Art of Packaging the ILC's Work Product* 29, in *THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS: ESSAYS IN MEMORY OF SIR IAN BROWNLIE* (Maurizio Ragazzi ed. 2013).

Gridlock and its wages

Article 13 of the UN Charter tasks the General Assembly with, among other things, “encouraging the progressive development of international law and its codification.”² The General Assembly, in turn, has delegated this responsibility to the ILC in the Statute of the International Law Commission (hereinafter the “ILC Statute” or the “Statute”).³ The ILC is therefore an agent of the General Assembly, operating within both the legal limits and political constraints imposed upon it by that UN body.⁴ Principal-agent theory can help explain the changing role of the ILC in the codification and progressive development of international law. In this section, we analyze the relationship between the General Assembly and the ILC in light of principal-agent theory. Our central claim is that the increasing gridlock in the General Assembly over time has constrained the ILC’s ability to carry out what has historically been its primary function of drafting treaties. These constraints have led the ILC to look for new ways to influence the formation and codification of CIL. We demonstrate this claim empirically with a comprehensive review of how the ILC’s output has changed since its inception in 1947, as well as concrete anecdotes drawn from current efforts to prepare draft articles on the immunity of foreign officials from criminal jurisdiction.

The ILC’s mandate

Mirroring the language in Article 13 of the UN Charter, the ILC Statute charges the Commission with “the promotion of the progressive development of international law and its codification.”⁵ As a formal matter, the Statute treats progressive development and codification differently. The Statute defines progressive development as the “preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of states.”⁶ Codification, on the other hand, means “the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.”⁷ The Statute underscores this distinction by establishing somewhat different procedures for the ILC to follow depending on its task.⁸

² UN Charter, art. 13.

³ Statute of the International Law Commission, adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981.

⁴ Cf. Cogan, *supra* note 1, at 278-79 (“The ILC’s role, therefore, was to assist States in their lawmaking function by thoroughly researching and debating topics in need of codification and drafting texts that could then be used as starting points by States in their treaty negotiations.”).

⁵ ILC Statute, art. 1(1).

⁶ *Id.*, art. 15.

⁷ *Id.*

⁸ See *id.*, arts. 16-24. The principal difference is that the procedures for codification focus on collecting information from governments about state practice and reaching conclusions on the basis of that practice, while progressive development involves consulting with expert and technical bodies and other international organizations with relevant expertise.

These definitions are connected to the output the General Assembly expects. Where the ILC engages in progressive development, the Statute contemplates draft conventions; where it engages in codification, the ILC is given wider latitude with regard to the form of its product. More specifically, when engaged in codification the Statute directs the ILC to submit a report to the General Assembly with a recommendation as to whether to: (1) take no action; (2) adopt the report; (3) adopt draft articles submitted by the ILC; or (4) convene a diplomatic conference to negotiate a convention.⁹

No matter the task it is engaged in or its final product, however, the Statute envisions a supervisory role for the General Assembly. Proposals for progressive development come from the General Assembly, UN members, or other international organizations.¹⁰ Where codification is concerned, the ILC has leeway to select its own topics, but it is required both to submit its recommendations for topics to the General Assembly, and to give priority to requests from the General Assembly.¹¹ The Statute mandates an opportunity for UN member states to comment on the ILC's drafts or provide information about their practices.¹²

Whichever track the ILC chooses, its final product is reported annually to the General Assembly—in particular the Sixth Committee of the General Assembly, which deals with legal affairs—for review and action. The Sixth Committee considers these reports each fall. This review of these reports gives states an additional opportunity to opine on the ILC's progress and provide input and direction on an ongoing basis. Even where the Sixth Committee does not formally endorse or reject the ILC's work product, member state comments provided on the Commission's annual reports and after initial readings of projects implicitly shape the ILC's activities by indicating the kind of reception that its final products will receive in the UNGA (and, in the case of proposed conventions, the likelihood of ratification and entry into force). Ultimately, however, the General Assembly “has the final say on the disposition of the Commission's drafts. It can approve them, send them back for redrafting, or reject them.”¹³

Principal-agent theory and the UNGA-ILC relationship

Principal-agent theory helps to understand the relationship between the ILC and the General Assembly, and in particular how that relationship has changed over time. The theory, which has been widely applied to the study legal institutions,¹⁴ including international organizations,¹⁵ builds upon rational-choice theories of domestic and

⁹ *Id.*, art. 23.

¹⁰ *Id.*, art 16-17.

¹¹ *Id.*, art. 18.

¹² *Id.*, arts. 16(h), 17(b), 19.2, & 21.2.

¹³ H.W. Briggs, *The Work of the International Law Commission*, 17 JAG J. 56, 80 (1963).

¹⁴ See, e.g., John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565 (1992); Randall, Calvert, Mathew McCubbins and Barry Weingast, *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588 (1989).

¹⁵ See, e.g., Joel P. Trachtman, *The Economic Structure of the Law of International Organizations*, 15 CHI. J. INT'L L. 162 (2014); Manfred Elsig, *Principal-Agent Theory and the World Trade Organization: Complex Agency and “Missing Delegation,”* 17 EUR. J. INT'L REL. 495 (2011); Andrew T. Guzman &

international politics. It posits that self-interested actors involved in governance and policymaking—such as voters or legislators at the domestic level, and states at the international level—delegate power to other actors—such as domestic administrative agencies or international organizations—to provide benefits that the principals could not achieve on their own.

Delegating may be desirable for a number of reasons—because the agent can perform a task more efficiently, has superior knowledge or experience, or because the principal has limited time or resources. For example, the General Assembly delegated to the ILC its responsibilities under Article 13 of the UN Charter because of the ILC’s distinctive expertise in international law. The ILC can draw on its members’ specialized knowledge and experience to prepare draft texts that more accurately assess existing state practice and *opinio juris*. The ILC might also be able to prepare these texts more efficiently than the General Assembly due to its significantly smaller size and the fact that its members serve in their personal capacities rather than as representatives of states.

The advantages of delegation are substantial, but they can also entail considerable costs.¹⁶ In particular, in carrying out their assigned tasks agents may seek to further their own interests rather than those of the principals. The mechanisms used to deter such behavior are a central focus of principal-agent theory. These tools can be applied *ex ante* (for example, by controlling the appointment of agents and precisely defining their mandate), contemporaneously (by reviewing agents’ activities and decisions), and *ex post* (via reporting requirements, revisions to the terms of the delegation, and, in extreme cases, sanctions). All of these mechanisms are costly, however. The principal is thus unlikely to devote the resources required to ensure that an agent is perfectly faithful to the principal’s charge.¹⁷

Numerous provisions of the ILC Statute reveal the mechanisms by which the General Assembly can influence the Commission and its work. The UNGA is responsible for electing ILC members (Article 3), proposing topics for its consideration (Article 16), approving topics submitted by member states and IOs (Article 17), evaluating draft articles (Article 16, para. (j)), reviewing topics proposed by the Commission (Article 18), commenting on draft Articles (Article 20), reviewing final drafts (Article 22), and returning such drafts to the Commission for further consideration (Article 23).¹⁸ In addition to or instead of these formal oversight mechanisms, the General Assembly can use informal mechanisms, such as providing feedback on topics

Jennifer Landside, *The Myth of International Delegation*, 96 CAL. L. REV. 1693 (2008); Daniel L. Nielson and Michael J. Tierney, *Delegation to International Organizations: Agency Theory and World Bank Environmental Reform*, 57 INT’L ORG. 241 (2003).

¹⁶ Curtis A. Bradley & Judith G. Kelley, *The Concept of Delegation*, 71 L. & CONTEMP. PROBS. 1 (2008).

¹⁷ See Pablo T. Spiller & Emerson H. Tiller, *Decision Costs and the Strategic Design of Administrative Process and Judicial Review*, 26 J. LEG. STUD. 347 (1997).

¹⁸ JEFFREY S. MORTON, THE INTERNATIONAL LAW COMMISSION OF THE UNITED NATIONS 3 (2000); see also B.G. RAMCHARAN, THE INTERNATIONAL LAW COMMISSION: ITS APPROACH TO THE CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW 30 (1977) (“the [ILC] is in a subordinate relationship to the General Assembly” and “subject to [its] supervision and control”).

the Commission has proposed, to exercise de facto oversight over the ILC.

Characterizing the UNGA-ILC relationship as one of principal and agent does not, however, imply that the Commission does or should merely carry out the General Assembly's wishes. To the contrary, principal-agent theory, which assumes that agents have their own preferences, is fully compatible with international delegations that give agents broad independence and discretion. "Far from presupposing that agents slavishly follow the preferences of their principals, PA [principal-agent] analyses give us a theoretical language for problematizing and generating testable hypotheses about the sources and the extent of agents' autonomy and influence."¹⁹

Nearly seven decades of codification and progressive development work, which we describe in detail below, reveal how the Commission's independence, expertise and discretion operate in practice. The Sixth Committee and the General Assembly have frequently approved the draft articles and other legal texts that the Commission has prepared with relatively little modification. But not always. In 1953, for example, when the ILC urged the adoption of draft articles on the Continental Shelf and High Seas Fisheries, "the General Assembly declined to comply with the Commission's recommendation" and directed it to prepare a comprehensive text on the law of the sea.²⁰ Five years later, the ILC produced a draft Convention on Model Rules on Arbitration Procedures. "The U.N. General Assembly rejected the draft and merely took note of these 'Model Rules,' which were never implemented."²¹ Similarly, ILC's work in preparing the U.N. Watercourses Convention "was not linear: different approaches were tested and some were rejected, in part as a result of information received through the annual interaction between the Commission and the U.N. General Assembly."²² These examples reveal that the UNGA was not merely a rubber stamp for the ILC's work.

That the instances of outright UNGA rejection are few suggests that the Commission is highly adept at performing the expert tasks entrusted to it by the ILC Statute. But such a pattern is also consistent with an agent operating in the shadow of what it anticipates the principal will accept. As Jeffrey Morton has explained:

[T]he commission generally seeks to ascertain rules which are likely to be useful to states in the conduct of their relations, bears in mind what rules and formulations states are likely to agree to and, on the basis of its

¹⁹ Mark Pollack, *Principal-Agent Analysis and International Delegation: Red Herrings, Theoretical Clarifications, and Empirical Disputes*, Bruges Political Research Papers No. 2, at 5-6 (Feb. 2007); see also CARMEN PAVEL, *DIVIDED SOVEREIGNTY: INTERNATIONAL INSTITUTIONS AND THE LIMITS OF STATE AUTHORITY* 54 (2015) ("nothing in the principal-agent model entails a dominating relationship"). Agents with extensive independence, such as international courts, are often referred to as "trustees." E.g., Manfred Elsig and Mark Pollack, *Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization*, 20 EUR. J. INT'L REL. 391 (2014).

²⁰ Briggs, *supra* note 13, at 58.

²¹ Jonathan I. Charney, *Third Party Dispute Settlement and International Law*, 36 COLUM. J. TRANSNAT'L L. 65, 70 (1997).

²² Stephen C. McCaffrey, *The 1997 U.N. Watercourses Convention: Retrospect and Prospect*, 21 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 165, 166 (1997).

assessment of these two questions, proceeds to examine and deal with each topic. The pragmatic approach of the [ILC] limits, to a large degree, both the sources and subjects of international law that are considered legitimate.²³

As the conditions under which the principals' review and control of agents change, however, so to do the activities and decisions undertaken by the agents, especially those whose mandate gives them a high degree of autonomy.

Expected ILC behavior under conditions of increasing UNGA gridlock

As we have explained, principal-agent relationships give agents a range of discretion to act independently. The degree of discretion is a function of the terms of the delegation and the principal's supervision costs. As supervising the agent becomes more costly, the principal is less likely to do so. As such costs decline, an agent becomes more constrained. It follows that changes in the principal's supervision costs can result in shifts in the relationship between the principal and the agent.

The principal's decision-making rules are a key determinant of its supervision costs.²⁴ In collective bodies, such as the General Assembly, rejecting action by the ILC requires the affirmative vote of no more than a majority of voting members. Where a body operates by consensus, as the UNGA Sixth Committee does in practice,²⁵ as few as one dissenting vote can result in rejection. Moreover, the ILC may self-discipline, even without a formal vote, where a minority of states strongly opposes a particular proposal.²⁶ These decision rules raise the cost of supervision, but they tend to remain constant over time.²⁷ Supervision costs do increase, however, in response to a rise in the number of members of a collective body and in the heterogeneity of their preferences. We thus expect that as the UNGA becomes larger and more diverse, and as its members' views on particular international law topics diverge, its costs of supervising the ILC will also rise.

These insights help to explain changes in how the ILC has pursued its delegated task of codifying and progressively developing international law. The ILC's influence depends on the extent to which states and other actors accept and follow the legal instruments it promulgates. As explained above, the ILC Statute presents the Commission with a basic choice that shapes its ability to maximize this influence. The ILC can seek to have its work adopted by the General Assembly and, ultimately, states as a treaty. Alternatively, it can submit other work products—such as “principles” or

²³ MORTON, *supra* note 18, at 2-3 (discussing RAMCHARAN, *supra* note 18).

²⁴ Other supervision costs include the cost of informing oneself about the agent's actions.

²⁵ See, e.g., Press Release, U.N. GAOR, *Approving 16 Draft Resolutions, Legal Committee Continues Tradition of Consensus in Session's Final Debate*, GA/L/3473 (Nov. 15, 2013).

²⁶ We are grateful to Sean Murphy for this point.

²⁷ Similarly, the time and effort devoted to analyzing the ILC's annual reports—which can run to 300 pages, cover a wide range of legal issues, and must be done in the two-month period between the ILC's submission of the report and the debate in the Sixth Committee—represents a supervision cost. These costs may have risen over time to the extent that the length of reports has increased, an issue outside the scope of this chapter.

“conclusions”—or it can prepare draft articles without recommending that the UNGA adopt them as a treaty. These latter outputs resemble restatements of U.S. law. They synthesize, memorialize, and sometimes shift the meaning of existing international rules, but the instrument itself does not take on legally binding status. Critically, turning the ILC’s final product into a treaty requires affirmative approval by the General Assembly²⁸—something that becomes less likely as gridlock increases. The ILC’s “restatements,” however, can influence CIL without UNGA action. For example, states and international tribunals may cite the ILC’s work as authoritative, as has often occurred for the Draft Articles on State Responsibility. To be sure, the General Assembly retains the power to disapprove of the Commission’s non-treaty outputs. But under conditions of gridlock, such disapprovals will be rare.

We thus expect the ILC to choose the form of work product that maximizes its influence among states, subject to its expectations of how the UNGA will respond to its work. We are not alone in this making claim. As David Caron has argued, “it is entirely proper for the ILC to consider the endgame of its work product, and to take account of possible dysfunctions in the state system generally or relating to a particular topic.”²⁹ To our knowledge, however, we are the first to put forward a theory of ILC influence using principal-agent theory.

Specifically, we expect the ILC to recommend that the General Assembly adopt its draft articles as a treaty if it believes the treaty is likely to be adopted and enter into force. The political endorsement of the ILC’s work by the UNGA that comes with the treaty-making process makes subsequent adherence by states more likely, all else equal. Similarly, the markers of state acceptance that accompany treaty ratifications remove the uncertainty as to the existence and scope of a legal obligation that often accompany CIL.

By contrast, as gridlock increases the likelihood of General Assembly inaction, we expect the ILC to turn to other legal outputs. This enhanced risk of inaction could flow from political polarization within the General Assembly. Alternatively, it could be the result of the ILC considering issues on which states have more heterogeneous preferences. Arguably, the ILC’s current work program includes topics that are more difficult than its earlier work codifying, for example, the law of treaties or diplomatic relations.

The causes of polarization do not affect our prediction, however. Rather, our focus is only on the effects of UNGA polarization—whatever its causes—on ILC behavior. Specifically, we predict that polarization increases the probability of inaction by the UNGA. Inaction, in turn, induces the ILC to increase the influence of its outputs

²⁸ Although creating international obligations via a treaty ultimately requires states individually consent to the agreement, the adoption of a treaty by an international organization or diplomatic conference is a critical prior step. Adoption represents a collective decision by the member states to proceed with the instrument. Adoption gives all member states—including those that have no intention of signing or ratifying the agreement—the chance to decide whether the treaty will even be opened for signature, as well as to influence its content. See Timothy Meyer, *From Contract to Legislation: The Logic of Modern International Lawmaking*, 14 CHI. J. INT’L L. 559 (2014).

²⁹ Caron, *supra* note 1, at 866.

through means other than General Assembly approval. Restatements, principles, and other non-binding codifications of particular international law topics allow the ILC to achieve this result.

In sum, principal-agent theory leads us to predict that the ILC—an institution that seeks to influence the content of international law—will have greater control over the form and content of its work product as the likelihood of gridlock and inaction in the General Assembly rises. If the Commission expects to the UNGA to approve its work, we expect the ILC to prefer the treaty-making route. In contrast, if it expects that gridlock will prevent a treaty’s adoption, the ILC will seek other pathways to enhance its influence. As we explain below, the historical record provides support for our claim, revealing that the ILC has shifted over time from treaty-making to “restatements” and other non-treaty outputs.

The shift from treaties to non-binding codifications

For most of its history, the ILC has submitted draft articles to the General Assembly with a recommendation that the articles form the basis for a convention.³⁰ This preference for proposing treaties reflects, in part, the fact that the distinction between codification and progressive development has been elusive in practice.³¹ As Hersch Lauterpacht has written:

[T]here is very little to codify if by that term is meant no more than giving, [in the language of ILC statute Article 15], precision and systematic order to rules of international law . . . once we approach at close quarters practically any branch of international law, we are driven, amidst some feeling of incredulity, to the conclusion that although there is as a rule a consensus of opinion on broad principle . . . there is no semblance of agreement in relation to specific rules and problems.³²

Most topics that the ILC undertakes involve a mix of identifying abstract rules on which states agree (codification) and attempting to propose solutions about rules on which they do not agree (progressive development).³³ Because the distinction has been difficult to maintain in practice, the ILC in its first half-century usually opted for treaties as the preferred outcome, generally eschewing the “reports” and other outputs that the ILC Statute contemplates when the Commission is engaged in codification. The political blessing that came with recommending treaties papered over the question of whether the draft articles were in fact CIL supported by state practice and *opinio juris* (as required for codification).

³⁰ See Cogan, *supra* note 1, at 278.

³¹ Timothy Meyer, *Codifying Custom*, 160 U. PA. L. REV. 995, 1008 (2012).

³² Hersch Lauterpacht, *Codification and Development of International Law*, 49 AM. J. INT’L L. 16, 17 (1955).

³³ Meyer, *supra* note 31, at 1008 (arguing that in practice “codification has been an exercise in identifying areas of custom and attempting to fill in the gaps.”).

Table 1 below³⁴ illustrates the dominance of treaty recommendations prior to the turn of the century. It displays three sets of data: (1) the number of projects completed in roughly each third of the ILC's existence, classifying projects into time periods based on the date the ILC completed the project; (2) the ILC's recommendation as to whether to pursue a treaty; and (3) whether a treaty has in fact entered into force. Between 1947 and 1999, the Commission's consistent practice was to "recommend to the General Assembly the elaboration of a convention on the basis of the draft articles."³⁵ During that period, the ILC completed 30 projects. The ILC concluded 20 of those projects by recommending a convention. By and large, the General Assembly collectively, and states individually, agreed. 14 of the 20 recommended conventions were adopted and have entered into force—a success rate of 70%. This success rate is even higher in the first twenty-five years of the Commission's work, from 1949-1974. During that period the Commission recommended 14 conventions out of 21 completed projects. 12 of those 14 entered into force, for a success rate of 86% (see Table 1).

Table 1

	1947-1999	1947-1974	1975-1999	2000-2014
Projects Completed	30	21	9	12
Convention Recommended	20	14	6	2
Convention recommended and in Force	14	12	2	0
Success Rate	70%	86%	33%	0%

The twenty-first century, by contrast, has seen the ILC shift away from work products that are intended to become treaties. From 2000 to 2014, the Commission completed 12 projects. Of those, it recommended a treaty in only two instances—the Prevention of Transboundary Harm from Hazardous Activities, and Diplomatic Protection. As of March 2015, the UNGA had not adopted either recommendation—a success rate of 0%.³⁶

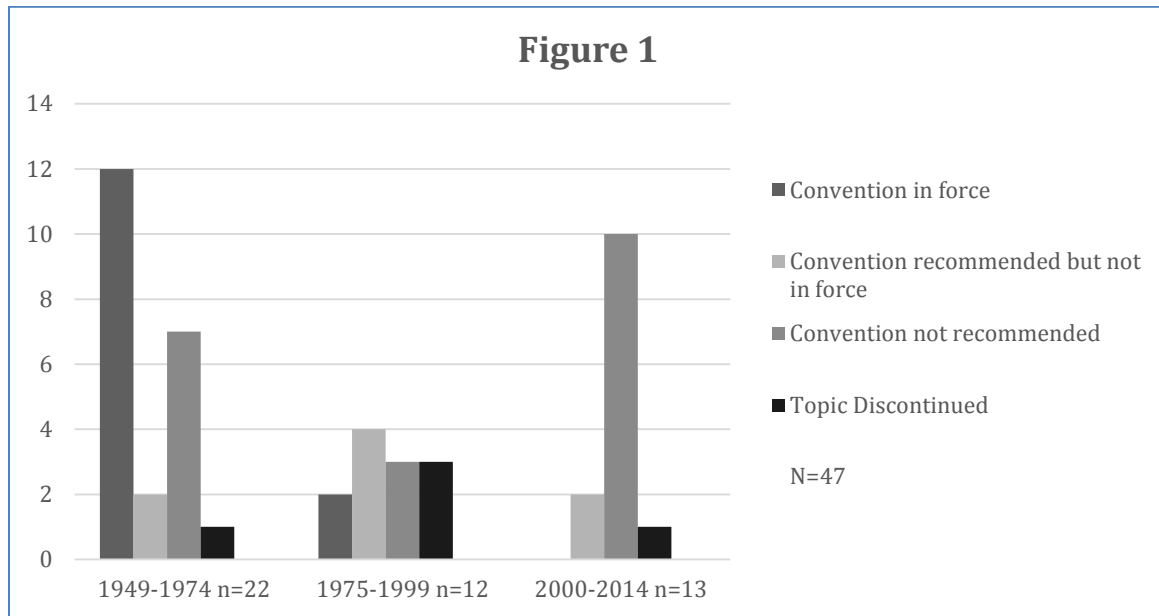
Figure 1 reproduces the data in a graphical format with two additions—the number of projects for which the Commission did not recommend a treaty, and discontinued projects. Figure 1 illustrates the stark decline in recommended treaties and the concomitant rise in outputs that the Commission does not contemplate becoming

³⁴ The tables and figures in this section are based on authors' coding of all ILC outputs since 1947. The coding is based on data obtained from a four-volume treatise that comprehensively analyzes the Commission's work. ARTHUR WATTS, *THE INTERNATIONAL LAW COMMISSION, 1949-1998* (1999) (3 vols.); MICHAEL WOOD & ARNOLD PRONTO, *THE INTERNATIONAL LAW COMMISSION, 1999-2009* (2011). More recent information was obtained from the ILC website, <http://www.un.org/law/ilc/>.

³⁵ ILC Statute, art. 13.

³⁶ The UNGA adopted the Convention on Jurisdictional Immunities of the State in 2004. However, the ILC completed its work on jurisdictional immunities in 1991, and thus we include this project in the 1974-1999 period.

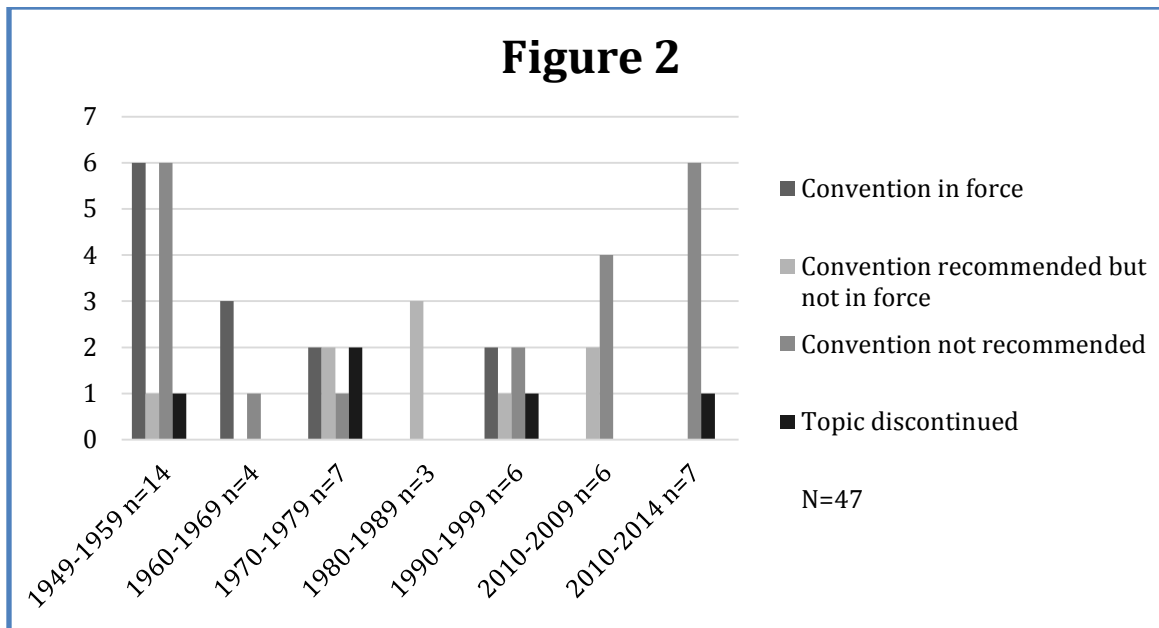
treaties. Since 1975 the Commission has proposed a total of eight treaties, of which only two are in force—a 25% success rate (see Figure 1). In contrast, over two-thirds of ILC projects ending in the same period, including discontinued topics, concluded without the ILC recommending a treaty (17 of 25, or 68%). This percentage rises to a striking 85% (11 of 13) for projects ending between 2000 and 2014.



A more fine-grained look at our dataset of ILC outputs sheds light on the interaction between the General Assembly’s behavior and the Commission’s recommendations. In the 1980s, the Commission completed only three projects (see Figure 2). In each instance, the ILC recommended a convention, and in each instance the proposed convention failed to enter into force.³⁷ While the number of observations is too small to draw firm conclusions, the small number of projects completed—and their lukewarm reception from states—suggests that the ILC may have concluded that it could no longer expect to influence the evolution of international law via treaty proposals.

Figure 2 reveals that the slow pace of the Commission’s work continued through 1990s, a decade during which the ILC completed five projects, recommending conventions in only three instances. Of those three, only two have entered into force. But the way in which they have done so is suggestive of dissensus among states even when the General Assembly adopts a draft treaty. The Convention on the Non-Navigational Uses of International Watercourses, for example, was adopted in 1997 but only obtained the minimum necessary 35 ratifications in 2014.

³⁷ The two conventions adopted by the UNGA that did not enter into force are State Succession in Respect of Property, Archives, and Debt and Treaties with International Organizations. The General Assembly did not adopt the third proposed treaty on Diplomatic Couriers.



Given this declining success rate, it is hardly surprising that the ILC has turned almost exclusively to non-treaty outputs. Perhaps the most prominent example of this shift is the ILC's Draft Articles on State Responsibility. The ILC adopted the draft articles in 2001 and submitted them to the General Assembly with a recommendation only that the UNGA "take note" of the draft articles. This recommendation followed guidance from a number of countries (including China, Japan, and the United Kingdom, and the United States) that, in the words of Special Rapporteur James Crawford, worried that states would not:

see it in their interests to ratify an eventual treaty, rather than relying on particular aspects of it as the occasion arises. They [the countries opposing a draft treaty based on the ILC's draft articles] note the destabilizing and even "decodifying" effect that an unsuccessful convention may have. In their view it is more realistic, and is likely to be more effective, to rely on international courts and tribunals, on State practice and doctrine to adopt and apply the rules in the text. These will have more influence on international law in the form of a declaration or other approved statement than they would if included in an unratified and possibly controversial treaty.³⁸

As Crawford makes clear, divisions among states made the adoption and entry into force of a convention on state responsibility unlikely. Given this fact, the ILC had to consider how to enhance the influence of its work. Bypassing the treaty-making process was deemed the best approach, both because it denied states the opportunity to formally express disagreement with aspects of the draft articles and because it opened other avenues—the disaggregated and relatively uncoordinated actions of states and

³⁸ James Crawford, *Fourth Report on State Responsibility*, UN Doc. A/CN. 4/517, para. 23 (2001).

international tribunals and organizations—for the ILC’s work to gain traction.³⁹

More recently, other conflicts have arisen in the General Assembly regarding ILC outputs. In its 2013 end of year review of the Commission’s work, a number of states in the Sixth Committee challenged the form of two sets of draft articles—on Transboundary Harm from Hazardous Activities and on the Law of Transboundary Aquifers. The United States, for example, argued that both texts “went beyond the present state of international law and practice . . . [and] were designed as resources to encourage national and international action in specific contexts, rather than to form the basis of a global treaty. Therefore, [the United States] expressed support for retaining them in their current form.”⁴⁰ Similarly, in discussing the Draft Articles on Transboundary Aquifers, Bahrain (on behalf of the Arab Group) called for more scientific research on the topic and further study of state practice before the draft articles could be turned into a treaty.⁴¹

The Commission’s ongoing projects continue this trend towards non-binding codifications. Because the ILC has not yet made a recommendation to the General Assembly regarding these projects, we omit them from the data reported in Figures 1 and 2. Nevertheless, the Commission already appears committed to pursuing non-binding codifications in its current projects on the Identification of Customary International Law⁴² and the Subsequent Agreement and Subsequent Practice in relation to the Interpretation of Treaties,⁴³ both of which will result in “conclusions.” Moreover, the project on the Protection of the Atmosphere is likely to end in non-binding “Guidelines,”⁴⁴ while the ILC’s second study of the most-favored nation clause will conclude with just a report.⁴⁵

One ongoing project for which the Commission is preparing draft articles—the immunity of foreign officials from criminal jurisdiction (foreign official immunity)—provides an especially apt example of how disagreement in the General Assembly can stall treaty-making in the ILC.⁴⁶ The Commission added foreign official immunity to its work program in 2006. Its work began in earnest with the appointment of Roman Kolodkin of Russia as the Special Rapporteur. During his tenure in that position, Kolodkin wrote three reports on the immunity of state officials: a *Preliminary Report* in 2008,⁴⁷ a *Second Report* in 2010,⁴⁸ and a *Third Report* in 2011.⁴⁹ In 2012, with

³⁹ See Caron, *supra* note 1, at 864 (“[W]eaving through this debate [in the ILC] on the likely outcome of traditional lawmaking processes were estimations that the ILC’s articles would have as much, if not more, influence if the attempt were not made to put them in a treaty form.”).

⁴⁰ Press Release, U.N. GAOR, *Praising Draft Texts on Transboundary Harm, Aquifers, Allocation of Loss, Delegates Disagree over Final Forms, Seek Further Examination*, GA/L/3464 (Oct. 22, 2013).

⁴¹ *Id.*

⁴² See Report of the Int’l Law Comm’n ¶¶ 66-76, U.N. Doc. A/69/10 (2014).

⁴³ See Report of the Int’l Law Comm’n ¶¶ 133-185, U.N. Doc. A/69/10 (2014).

⁴⁴ See Report of the Int’l Law Comm’n ¶¶ 218-28, U.N. Doc. A/69/10 (2014).

⁴⁵ See Report of the Int’l Law Comm’n ¶¶ 262-64, U.N. Doc. A/69/10 (2014).

⁴⁶ It is worth recalling that although it is preparing draft articles, the Commission does not have to choose whether to recommend a treaty until it completes its work.

⁴⁷ *Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, Int’l Law Comm’n, U.N. Doc. A/CN.4/601 (May 29, 2008) (by Roman Anatolevich Kolodkin).

Kolodkin's departure from the ILC, the Commission appointed a new Special Rapporteur, Concepcion Escobar Hernandez. To date, Escobar Hernandez has produced a *Preliminary Report*,⁵⁰ a *Second Report*,⁵¹ and a *Third Report*.⁵² Additionally, Escobar Hernandez proposed several draft articles in connection with her *Second* and *Third* Reports. The Commission referred these articles to the drafting committee. After some modifications by the drafting committee, the ILC Plenary adopted the draft articles.⁵³

Two related issues have animated debates within the ILC on foreign official immunity. The first is the scope of, and any exceptions to, the immunity of foreign officials. The second is the extent to which the Commission should engage in codification versus progressive development. Kolodkin, the first Special Rapporteur, generally favored codifying existing state practice—an approach that many members of the Commission indicated would result in broad immunity for foreign officials. Escobar Hernandez's approach was different. Following the suggestion of many members who were critical of Kolodkin's reports, Escobar Hernandez indicated that she did not intend to undertake a codification exercise limited to extant custom, but would include elements of progressive development as well.⁵⁴ She also stressed the need to base the Commission's work on "the current values of the international community."⁵⁵

The sharp divisions and strongly held beliefs on these questions are also apparent in the General Assembly's review of the ILC's work. State representatives have taken conflicting positions on virtually every key issue with which the Commission is grappling, making it difficult to prepare draft articles that are likely to win favor in the General Assembly. For example, on the question of codification versus progressive development, several delegates urged the Commission to focus on "reviewing and summarizing relevant practices and rules" of immunity instead of establishing new immunity rules.⁵⁶ By contrast, others urged the Commission to follow Escobar

⁴⁸ *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, Int'l Law Comm'n, U.N. Doc. A/CN.4/631 (June 10, 2010) (by Roman Anatolevich Kolodkin).

⁴⁹ *Third Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, Int'l Law Comm'n, U.N. Doc. A/CN.4/646 (May 24, 2011) (by Roman Anatolevich Kolodkin).

⁵⁰ *Preliminary Report on the Immunity of State Officials from Foreign Criminal Jurisdiction*, Int'l Law Comm'n, U.N. Doc. A/CN.4/654 (31 May 2012) (by Concepcion Escobar Hernandez) [hereinafter "*Hernandez Preliminary Report*"].

⁵¹ *Second Report on the Immunity of State Officials from Foreign Criminal Jurisdiction*, Int'l Law Comm'n, U.N. Doc. A/CN.4/661 (4 April 2013) (by Concepcion Escobar Hernandez).

⁵² *Third Report on the Immunity of State officials from foreign criminal jurisdiction*, Int'l Law Comm'n, U.N. Doc. A/CN.4/673 (2 June, 2014) (by Concepcion Escobar Hernandez) [hereinafter "*Escobar Hernandez Third Report*"].

⁵³ Text of Draft articles 1, 3 and 4 provisionally adopted by the Drafting Committee at the sixty-fifth session of the International Law Commission, U.N. Doc. A/CN.4/L.814 (4 June 2013); Text of Draft articles 2(e) and 5 provisionally adopted at the sixty-sixth session of the International Law Commission, U.N. Doc. A/CN.4/L.850 (15 July 2014).

⁵⁴ *Preliminary Summary Record of the 3143rd Meeting* [10 July 2012], U.N. Doc. A/CN.4/SR.3143, 4.

⁵⁵ *Hernandez Preliminary Report*, *supra* note 50, at para. 67.

⁵⁶ Press Release, U.N. GAOR, *Delegations Urge Expanded 'Foreign Criminal Jurisdiction' Immunity for Broader Range of State Officials*, GA/L/3448 (Nov. 5, 2012); *see also* Press Release, U.N.

Hernandez’s recommendation that the Commission consider the issue from both the perspective of *lex lata* and *lex ferenda*.⁵⁷ States also divided on the scope of official immunity. Some delegations, like Greece and South Korea, urged the Commission to include exceptions to immunity for the most serious international crimes.⁵⁸ African countries such as Kenya and Algeria expressed greater skepticism that state practice supported such exceptions.⁵⁹ Delegations similarly took opposing views on what the outcome of the ILC’s process should be, with some suggesting a binding treaty and others urging a non-binding instrument.⁶⁰

The most telling example of the gridlock within the General Assembly on foreign immunity questions, however, is not what state representatives have said about the ILC’s work on foreign official immunity. Rather, it is the fact that the General Assembly has initiated its own parallel investigation into the topic of universal jurisdiction—an issue that is inextricably linked to the immunity of foreign officials from domestic criminal prosecution. The General Assembly took up this investigation at the urging of Tanzania, which in July 2009 submitted a request to include “the subject and scope of universal jurisdiction” on the General Assembly’s agenda.⁶¹ In so doing, Tanzania acted on behalf of the African Group, which had previously adopted a resolution calling for “exhaustive[]” discussions at the U.N. in response to the indictments “issued in some European States against African leaders.”⁶² The Tanzanian request noted similar concerns, including the “ad hoc and arbitrary application [of the principle], particularly towards African leaders.”⁶³

The General Assembly assigned the matter to the Sixth Committee—the same body which reviews the ILC’s work.⁶⁴ In meetings in 2009 and 2010, State representatives expressed widely divergent views, with a number expressly linking

GAOR, *Natural Disaster Relief Draft Articles Need Clearer Parameters, Argue Delegates as Legal Committee Continues Review of International Law Commission Report*, GA/L/3447 (Nov. 2, 2012).

⁵⁷ Press Release, U.N. GAOR, *Natural Disaster Relief Draft Articles Need Clearer Parameters, Argue Delegates as Legal Committee Continues Review of International Law Commission Report*, GA/L/3447 (Nov. 2, 2012) (for example, the Austrian representative urged that “the starting point must be the identification of existing norms of international law, followed by possible progressive development in accordance with the present needs of the international community.”).

⁵⁸ Press Release, U.N. GAOR, *As Review of International Law Commission Report Continues, Legal Committee Tackles Definitions, Interpretations of Draft Texts*, GA/L/3466 (Oct. 29, 2013).

⁵⁹ Press Release, U.N. GAOR, *Immunity of State Officials Remains at Issue as Committee Ends Review of International Law Commission Report*, GA/L/3428 (Nov. 4, 2011).

⁶⁰ *Id.*

⁶¹ Letter from the Permanent Representative of the United Republic of Tanzania to the United Nations Secretary-General, Request for the Inclusion of an Additional Item in the Agenda of the Sixty-Third Session, A/63/237/Rev.1 (July 23, 2009).

⁶² Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/11 (XIII) at ¶¶ 3, 4 (Jul. 3, 2009).

⁶³ Press Release, U.N. GAOR, Sixth Committee, *Legal Committee Delegates See Principle of Universal Law as Safeguard Against Impunity for Major Crimes; Some Caution on Risk of Abuse*, GA/L/3371 (Oct. 20, 2009) [2009 Sixth Committee Meeting].

⁶⁴ Press Release, U.N. GAOR, *Sixth Committee Delegates Discuss Ways to Further Review Complex, Controversial Issues of Applying Universal Legal Jurisdiction: Some Say Principle Subject to Abuse, Violating Existing Law*, GA/L/3392 (Oct. 13, 2010).

universal jurisdiction to the scope of foreign official immunity. Delegates from African and Asian countries stressed that the application of universal jurisdiction must be consistent with the principles of sovereign and foreign official immunity.⁶⁵ In contrast, delegates from Europe and Latin America generally praised universal jurisdiction as a backstop to other national prosecutions and a tool to prevent impunity for international crimes.

In subsequent years, delegates have debated the appropriate division of labor between the Sixth Committee and the ILC. These debates reveal a wide dissensus among member states and suggest the likelihood of gridlock should the ILC recommend a treaty based on draft articles. Several delegates called for referring the universal jurisdiction agenda item to the Commission for further study, stressing “the fundamentally juridical and technical nature of the subject.”⁶⁶ Others opined that “[b]ecause the Committee was a political body and the [ILC] an expert one, it was more appropriate for the Commission to study the topic further.”⁶⁷ In further discussions in 2013, Uganda’s representative echoed this sentiment, asking “If not in this forum [the UNGA’s Sixth Committee], then where?”⁶⁸

The disagreements in the General Assembly over foreign official immunity and universal jurisdiction have sent conflicting signals to the ILC. On the one hand, state views on the scope of immunity are polarized. Perhaps for this reason, the Commission has to date deferred difficult questions about whether exceptions to immunity exist. At the same time, the General Assembly has opened another front on a closely-related issue. Not only have similar divisions among states emerged in the Sixth Committee’s discussion of universal jurisdiction. The practice of forum shopping within the General Assembly as a means of fracturing opinion, rather than building consensus in favor of a single approach, has called into question the reception the ILC’s work will receive. In sum, this example illustrates the dangers of trying to win consensus on a treaty, and the advantages for the Commission of looking beyond the General Assembly to find an audience for its work.

The renewed importance of customary international law methodology

Our primary claim in this chapter is that gridlock in the UNGA affects the ILC’s choice of work product. In this section, we make a second claim: that the shift away from preparing draft treaties increases the salience of the methodology that the ILC uses to enhance its influence. As the ILC’s ability to promulgate texts that will be adopted as

⁶⁵ *Id.*

⁶⁶ General Assembly of the U.N., Sixth Comm., Sixty-Sixth Session: *The Scope and Application of the Principle of Universal Jurisdiction*; see also U.N. GAOR, 67th Sess., 13h mtg., at ¶¶ 15, 22, UN Doc. A/C.6/67/SR.13 (Oct. 18, 2012).

⁶⁷ *Id.*

⁶⁸ Press Release, U.N. GAOR, *At Conclusion of Sixth Committee Debate, Delegates Cite Abuse of Universal Jurisdiction, ‘Lip Service’ to Fight Against Impunity*, GA/L/3462 (Oct. 18, 2013); see also U.N. GAOR, 67th Sess., 13th mtg., at ¶9, UN Doc. A/C.6/67/SR.13 (Oct. 18, 2012); Press Release, U.N. GAOR, *Delegations Urge Clear Rules to Avoid Abuse of Universal Jurisdiction Principle, Seek Further Guidance from International Law Commission*, GA/L/3341 (Oct. 17, 2012).

treaties narrows, the Commission has an increased interest in having states and other actors accept its non-binding texts as CIL. Yet, these actors may have doubts about the persuasive value of ILC texts that lack the General Assembly's blessing. Adherence to a methodology can alleviate these worries by providing an alternative mechanism to limit the ILC's discretion when the traditional constraint of UNGA review is unavailable due to gridlock. The Commission can use the constraints of methodology, in other words, to persuade other actors that its non-treaty outputs possess the properties of rule-legitimacy—determinacy, symbolic validation, coherence, and adherence—that Thomas Franck famously identified.⁶⁹ But what methodology has this effect? The traditional sources of CIL are one plausible choice. At the same time, the ILC may wish to adopt approaches that give it relatively more discretion.

In what follows, we first discuss the rising importance of methodology as a constraint on the ILC. We then explore the new light that methodology sheds on the sources the Commission has used in its ongoing codification of the law of foreign official immunity.

Can methodology constrain the ILC?

At the outset, we confront the question of whether CIL methodology matters at all. As much scholarship has emphasized, the traditional test for CIL is plagued by indeterminacy. This indeterminacy, in turn, has led scholars to question whether methodology does any work in shaping the content of the CIL. In her contribution to this volume, Monica Hakimi writes that “because the CIL process is so unstructured, it lacks the formal controls that might inhibit the participants from pushing hard for their preferred norms—making the opportunistic claims that methods for finding CIL try to weed out.”⁷⁰ And as Curtis Bradley suggests in his analysis of the adjudication of CIL, the content of custom is determined by a process analogous to the common law, in which judges make choice that are shaped by “assessments of state preferences as well as social and moral considerations.”⁷¹ If the preferences of states, judges and other actors about substantive norms are all that matter, methodology would appear to exert little if any force in constraining competing claims about the content of CIL.

We disagree with these approaches, at least as applied to the ILC's articulation of custom. To be clear, we are not saying that the methodology the ILC adopts will produce determinate answers in all, or even in many, circumstances. But a methodology does not have to produce determinate answers in order to narrow the set of claims that actors may make about the content of rules.⁷² Our claim is thus a more modest one: the methodology that the ILC uses to identify custom limits the set of rules that the Commission can

⁶⁹ THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

⁷⁰ Monica Hakimi, *Custom's Process and Method: Lessons from Humanitarian Law* (in this volume) [manuscript p.11].

⁷¹ Curtis A. Bradley, *Customary International Law Adjudication as Common Law Adjudication* (in this volume) [manuscript p.1].

⁷² Cf. Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 213 (2008) (noting, in a discussion of the relative constraining effect of different theories of constitutional interpretation, that “no sensible legal system eliminates discretion entirely.”).

plausibly advance to influence the content of CIL through non-treaty outputs. To be sure, the ILC retains discretion in interpreting what custom requires, but that discretion is limited by how faithfully the Commission adheres to the methodology it espouses. Indeed, as we explain below, expert bodies like the ILC are more constrained by methodology than are other international actors.

The following thought experiment helps to illustrate these points. If method exerted no constraining influence whatsoever, the Commission could simply submit a list of proposed rules to the UNGA, perhaps backed by policy justifications. The rules' success would not need to be justified in terms of practice (state or otherwise), *opinio juris*, or other claims to legality, and we would not expect the ILC or other actors to spend any time canvassing these sources or couching their arguments in those terms. In reality, however, we do see actors, and especially the ILC, discussing CIL in terms of doctrine.

Consistency in adhering to a methodology is also in the Commission's self-interest. When the ILC engages in progressive development, it is not limited to examining the two traditional requisites of custom—widespread and extensive state practice and *opinio juris*. It is instead free to advance proposals for new international rules or extensions of existing rules that have yet to garner general support from states. For codification, in contrast, the Statute contemplates reliance on “extensive State practice, precedent and doctrine,” an arguably stricter evidentiary standard that imposes somewhat greater constraints on the ILC's norm generating activities.

As we explained in the previous section, the ILC in its early years demonstrated a preference for draft articles that it anticipated would be approved by the UNGA as multilateral treaties. This choice of work product gave the Commission relatively wide discretion to support draft texts with whatever evidence was available—whether or not that evidence was sufficient, or even relevant, to prove an existing custom—and to elide the often abstruse distinction between codification and progressive development.⁷³ Yet the ILC exercised this discretion in the shadow of UNGA review. If its members strayed too far from what the political winds would bear, they risked having the draft articles rejected or returned for further study and revision.

In response to increasing gridlock in the UNGA and pressure to take on more unsettled or contentious topics, the ILC has shifted to work products that do not contemplate the adoption of new conventions. Crucially, as explained above, these more malleable outputs—unlike the Commission's progressive development work—do not require formal approval by the UNGA to influence the content of international law (although such approval is of course desirable). Yet because these work products are generated pursuant to the ILC's delegated authority to codify extant custom rather than extend the law in new directions, their influence with other international and domestic

⁷³ See, e.g., Lauterpacht, *supra* note 32, at 17.

actors depends upon the extent to which the Commission supports its proposals with persuasive evidence that a putative custom in fact exists.⁷⁴

Seen from this perspective, the methodology that the ILC employs to create its work product may function as a de facto substitute for the political blessing traditionally associated with the UNGA's adoption of draft articles and preparation of multilateral conventions. That is, under conditions of UNGA gridlock, the Commission's choice of the codification track gives it greater discretion to select its preferred output (principles, conclusions, freestanding draft texts, and so forth), minimizing the possibility of rebuke or sanction from a hamstrung UNGA. Yet if those outputs are in fact to influence international law through uptake by actors other than the UNGA, the ILC must convince those actors that the methodology it employs to produce those outputs is itself valid. The need to persuade these actors serves as a check on the ILC that cabins its discretion to shape the content of international rules. In Franck's terms, the ILC gives its non-treaty outputs legitimacy through adherence to methodology, because the legitimacy available through the political approval process is foreclosed.

Significantly, the Commission's use of methodology as a mechanism of persuasion need not apply to other actors who advance claims about CIL. Some bodies may enjoy such widespread legitimacy and political support that they need not adhere to a particular methodology in order to have their pronouncements followed. The International Committee of the Red Cross (ICRC), which makes claims about customary international humanitarian law (IHL), may provide an example of this kind of institution. As Hakimi says, the ICRC's studies have had broad influence on customary IHL even though the extent to which they accurately reflect custom is contested.⁷⁵ Well-established and widely respected tribunals, such as the German Constitutional Court or the Inter-American Court of Human Rights, provide another example.⁷⁶

By contrast, institutions in newly emerging or fragile democracies—such as the U.S. Supreme Court in the early nineteenth century, Eastern European courts in the 1990s, intellectual property agencies in the Andean Community in the late 1980s—must develop legitimacy over time.⁷⁷ One strategy for doing so is to apply methodology even-handedly to a range of problems. Developing a reputation for applying methodology consistently may insulate a judicial, administrative, or other expert body from claims that it is simply resolving distributive conflicts in accordance with its (or some other actor's)

⁷⁴ Cf. Murphy, *supra* note 1 (noting that the “persuasive value” of non-binding codifications “would turn on their intrinsic merits”).

⁷⁵ Hakimi, *supra* note 70, at ___. It bears noting, however, that the ICRC study gave careful and extensive attention to methodology in the introductory chapter of its monumental study of customary IHL. See International Committee of the Red Cross, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xxxvii–xlvi (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

⁷⁶ See, e.g., Bradley, *supra* note 71, at [manuscript pp. 23–24] (discussing factors relating to judicial authority to develop custom).

⁷⁷ See, e.g., Lee Epstein, Jack Knight, & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 L. & SOC'Y REV. 117 (2001) (discussing constitutional courts); Laurence R. Helfer, Karen J. Alter and M. Florencia Guerzovich, *Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community*, 103 AM. J. INT'L L. 1 (2009) (discussing administrative agencies).

preferences.⁷⁸ Adherence to methodology, in other words, can enhance the influence of an institution seeking to garner widespread legitimacy.

This is true as well for the ILC under conditions of UNGA gridlock. Of course, the Commission has been codifying and progressively developing CIL for decades and, as a result, has built a reputation as a highly respected expert body. But that expertise—and the discretion that comes with it—was developed in light of certain expectations about the review of its work by U.N. political bodies. With the membership of those bodies increasingly divided, the opportunity for meaningful review has diminished. It should not be surprising, therefore, that the Commission would turn to other mechanisms—in particular methodology—as a way to maintain and even expand its influence under very different circumstances.

The role of methodology in the ILC's recent work

The ILC thus has an interest in adhering to a methodology in how it pursues its work. That methodology, however, need not be the traditional inquiry into state practice and *opinio juris*. Rather, the Commission may augment its influence by consistently employing an approach that deviates from the traditional mode of identifying CIL. We consider that possibility here.

At first blush, the idea of tinkering with methodology to expand discretion and broaden influence may seem inconsistent with the idea of using methodology as a constraint. Although there is undeniably a tension, the two approaches are not incompatible. A judge, for example, may select a preferred method of constitutional interpretation because she believes it reaches results that accord most of the time with her preferred interpretation of the law. Yet to maintain credibility with litigants and other actors, the judge may still feel compelled to adhere to that methodology even in cases in which it produces a result the judge does not like.

More specifically, we expect the ILC to select and, relatively consistently, adhere to a methodological approach aimed at attracting the support of the audience it hopes to persuade. Actors who are convinced by a strict approach to codification outside of treaty-making will be most convinced by ILC work products that closely adhere to the traditional requisites of custom. If this view predominates, we would expect the Commission to carefully investigate all potentially relevant sources of custom—including affirmative state practice by specially affected countries, acquiescence by other nations, and evidence and inferences of *opinio juris*. The ILC may even solicit the views of governments to bolster its findings based on these traditional sources.⁷⁹

⁷⁸ Cf. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981) (analyzing how courts maintain legitimacy in a triadic structure that requires them to take sides between two opposed parties).

⁷⁹ Indeed, when the ILC engages in progressive development it is required to solicit governments' views. See ILC Statute, art. 16(c).

On the other hand, executive branch officials are acutely aware that both their actions and their utterances in international law-related venues will be scrutinized for any hints about the existence or emergence of custom. They may, as a result, be reluctant to express a position that could later be used against them and instead couch their statements in deliberately vague or ambiguous language. To the extent that the Commission sticks to the canonical test for CIL, this reticence creates a challenge for the ILC's ability to make claims about extant custom. Similarly, the rise of countries such as India and China, and their growing willingness and capacity to contest the emergence of new customary norms contrary to their interests,⁸⁰ makes establishing the veneer of a "consistent state practice" all the more difficult, precisely because more states may seek to prevent a consensus about a putative legal rule from emerging.

If traditional indications of state practice and *opinio juris* are scarce or conflicting, the Commission may seek to expand the sources and materials it considers beyond those that states can manipulate directly. By giving weight to sources such as international and national court decisions, expert studies, resolutions of international organizations, and the Commission's own past work, the ILC can expand its ability to prepare codification-related work products not supported by canonical evidence of custom. Moreover, since the actors who can informally bless these outputs are not limited to states, concerns about deviating from a strict approach to custom may be reduced. This methodological move may thus liberate the ILC from some of the constraints imposed by conflicting state practice or political factions.

The ILC's study of foreign official immunity provides more support for the latter position—that the ILC relies today on evidence beyond canonical state practice and *opinio juris*—than the former. The Kolodkin and Escobar Hernandez reports—and the heated debates they engendered—do not contain detailed, country-by-country analyses of state practice as expressed, for example, in official government actions or pronouncements regarding immunity rules or their exceptions. The documents and discussions evince even less treatment of *opinio juris*. To the extent that traditional indicia of custom are referenced at all, they appear in the form of national legislation and executive branch positions taken in domestic litigation.

By far the most common evidence cited are ICJ judgments and national court decisions, as well as the views expressed by state representatives during debates in the Sixth Committee of the UNGA and other international forums. The *Escobar Hernandez Third Report* provides an illustrative example. In considering evidence of how the term "official" is defined in international law, the Report considers, in order, national judicial practice, international judicial practice, treaty practice, and other works of the Commission.⁸¹ Of these, only treaty practice—listed third—is classic state practice

⁸⁰ See, e.g., Zhu Lijiang, *Chinese Practice in Public International Law: 2013*, 13 CHINESE J. INT'L L. 395 (2014); Sunil T. Rao, *India*, in SOURCES OF STATE PRACTICE IN INTERNATIONAL LAW 262-67 (Ralph Gaebler & Alison Shea eds., 2014). The dispute between India and Italy over the shooting of two Indian fishermen by Italian military guards aboard the ship *Enrica Lexie* provides an apt illustration. See Hari Sankar, *Jurisdictional and Immunity Issues in the Story of Enrica Lexie*, EJILTalk! (Mar. 25, 2013).

⁸¹ See *Escobar Hernandez Third Report*, *supra* note 52.

geared towards foreign relations, although it may reveal little about whether the treaty has passed into customary international law.⁸²

With respect to the views expressed by state representatives, these statements might be considered a type of state practice, but their declarative content gives them greater weight as *opinio juris*, although it is an *opinio juris* inflected through the distinctive political environment of the international venues in which they are made and the recognition by states of the legal value (or lack thereof) of such statements. In addition, the extensive focus on methodological questions about codifying versus progressively developing international law suggests a desire by ILC members to be transparent about the Commission's role as it prepares draft articles and other work products for consideration by a wider community of actors.

In this way, the ILC's recent work product reveals that a strong form of the critique of customary international law is misguided—at least when applied to the Commission. While existing CIL methodology may be imprecise relative to the clear procedures that accompany treaty-making, institutions such as the ILC have an incentive to clarify custom's methodology as a way to increase their own influence. Indeed, the ILC has undertaken this task with its ongoing project on the "Formation and evidence of customary international/identification of customary international law."⁸³ The outcome of that process promises to limit, and by so limiting also expand, the ILC's importance in a post-treaty world.

The ILC faces a twin challenge. On the one hand, its influence likely requires working with materials beyond the canonical approach to CIL that privileges the actions and words of states. In a multipolar world, such inquiries will increasingly reveal sources that are conflicting or unclear. On the other hand, the ILC must devise methodological limits on its discretion to win acceptance for its more diverse work products. We therefore expect the ILC to surrender voluntarily some amount of discretion as the price of achieving legitimacy in the eyes of critical stakeholders, including the international bar, international judges, NGOs, and IOs. A renewed dedication to methodology by the ILC, in other words, functions as a costly commitment device. The ILC surrenders some discretion in customary lawmaking in exchange for furthering the influence of its non-treaty outputs in shaping international law in the twenty-first century. In short, the benefits of methodological constraints provide a reason internal to the operation of law—and consistent with the Commission's self-interest—for it to adhere to methodology.

⁸² The status of national court judicial decisions as state practice was long viewed with skepticism. Today most, but not all, commentators accept such decisions as state practice at least where they represent the authoritative statements of a nation's position about custom in a particular area. See Ingrid Wuerth, *International Law in Domestic Courts and the Jurisdictional Immunities of the State Case*, 13 MELB. J. INT'L L. 819, 821-22 (2012); see also Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMP. L.Q. 57, 62 (2011) (noting that such treatment complicated by the fact that national court decisions "play a distinctive dual role in the doctrine of sources: as evidence of State practice . . . and as a subsidiary means of determining the existence and content international law . . .").

⁸³ For ILC documents relating to this project, see http://legal.un.org/ilc/guide/1_13.htm.

Of course, these arguments do not allow us to show empirically that the ILC is in fact constrained by methodology. Our hope, however, is to test our hypothesis in future work. The simultaneous consideration of foreign official immunity in the ILC and the closely related topic of universal jurisdiction in the political Sixth Committee creates a kind of natural experiment. If our hypothesis regarding methodology is correct, we would expect the ILC, constrained to some degree by methodology, to reach different results than the Sixth Committee.

Conclusion

The International Law Commission is an institution at a crossroads. Since the 1980s its tried-and-true method of lawmaking—preparing draft treaty articles that skirt the line between codification and progressive development—has been stalled by gridlock in the General Assembly. To reassert its influence, the Commission has increasingly turned to non-binding codifications of customary international law. Yet since the legal force of these non-binding codifications turns on their status and acceptance as CIL, the methodology by which the ILC justifies its work has become increasingly important. Methodology, in effect, confers a legitimacy on the Commission’s work product that the political treaty-making process no longer can.

These shifts in the ILC’s practice may reflect larger trends in international lawmaking. We therefore conclude this chapter with some preliminary reflections on the generalizability of two aspects of our study: (1) the decline of broad-based multilateral treaty-making, and (2) the distinction between lawmaking by political and expert bodies.

The General Assembly’s slow pace of treaty-making is in line with broader trends in international lawmaking. On difficult issues ranging from climate change to closing the Doha Round at the World Trade Organization, governments have been unable to sustain the pace of multilateral lawmaking that characterized the second half of the twentieth century. Indeed, in many issue areas lawmaking seems to be shifting to regional fora.⁸⁴ This broader trend suggests that gridlock within the UNGA may not simply be a reflection of “easy” topics having already been codified. Rather, it may indicate a more fundamental breakdown of political consensus about critical legal issues, as well as a destabilization of power relationships that have long shaped the international lawmaking agenda.

The combination of these factors may have increased the transaction costs of multilateral treaty-making to such a degree that states are forced to look for alternative and less costly avenues of lawmaking, including soft law, customary international law, international tribunals, and regional organizations. But if the General Assembly’s gridlock is a symptom of these broader trends, further shifts in interstate power relationships or the emergence of a new consensus on particular topics may reanimate the UNGA. Our findings in this chapter suggest that, should these changes occur, the ILC

⁸⁴ See, for example, the plethora of regional trade agreements as well as the increased activity of regional and sub-regional organizations like the African Union, ASEAN, and ECOWAS.

will pivot back towards treaty-making, preferring the political endorsement of its work to more amorphous and diverse pathways to legitimacy and acceptance.

The relationship between the UNGA and the ILC also highlights an increasingly important distinction between expert and political bodies. Expert bodies like the ILC have come to play an increasingly important role in lawmaking in recent decades. The judicialization of some areas of international law is one manifestation of this trend.⁸⁵ In other areas, however, intergovernmental institutions comprised of experts who generally lack formal lawmaking authority have assumed a greater role in coordinating state behavior and in laying the groundwork for interstate negotiations. Examples include the International Renewable Energy Agency, the Intergovernmental Panel on Climate Change (IPCC), or the International Commission on Non-Ionizing Radiation Protection.⁸⁶ Expert bodies differ from political bodies like the UNGA or diplomatic conferences in that they generally operate by producing information—such as reports and recommendations—rather than directly generating new legal rules. This information often serves as the basis of subsequent international regulation.

The rise of expert bodies is often attributed to the increasing complexity of international problems and their potential solutions. In responding to this complexity, technocratic expertise may produce better governance outcomes than political bargaining. Yet the relationships between political and expert bodies remain poorly understood. In particular, we lack a well-developed account of whether delegating international lawmaking—or governance functions more generally—to expert bodies like the ILC produces different substantive outcomes or alters distributional issues. Questions to be explored include the following: When and why do states delegate responsibility for international governance to expert, as opposed to political, bodies? Do expert bodies that operate under intergovernmental supervision produce systematically different results from intergovernmental political bodies themselves? Are certain states systematically advantaged by the use of expert bodies? What factors influence the decision to delegate to one type of body or another? And what factors influence their effectiveness? Our study of the ILC suggests that widespread political support for expert bodies may be a sufficient but not a necessary condition for their effectiveness. Expert bodies will continue to seek opportunities to influence the evolution of international law even in the absence of a political consensus on the content of their work.

⁸⁵ See, e.g., Cesare P. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709 (1999); Eyal Benvenisti & George W. Downs, *Prospects for the Increased Independence of International Tribunals*, 7 GERMAN L.J. 1057 (2011); Laurence R. Helfer & Karen J. Alter, *Legitimacy and Lawmaking: A Tale of Three International Courts*, 14 THEORETICAL INQ. IN L. 479 (2013).

⁸⁶ See Timothy Meyer, *Epistemic Institutions and Epistemic Governance in International Environmental Law*, 2 TRANSNAT'L ENVIRON. L. 15 (2013) (analyzing the decision to divorce the International Renewable Energy Agency from multilateral lawmaking institutions); Oren Perez, *The Hybrid Legal-Scientific Dynamic of Transnational Scientific Institutions*, 25 EUR. J. INT'L L. (forthcoming 2015).